IN THE

Supreme Court of the United States

OCTOBER TERM 1977-8

No. 77-1464

— GERALDINE HUCH, ET AL —

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FOR PETITIONERS

LEON PETTIS
Goodhue Building
Beaumont, Texas 77701

JOE H. TONAHILL
P. O. Box 670
Jasper, Texas 75951
Attorneys for Petitioners

FIDELITY PRINTING COMPANY, HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977-8

No. .....

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI (BY PETITIONERS)

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

These Petitioners (Intervenors below), comprising in excess of 13,000 patrons and students of the South Park Independent School District of Beaumont, Texas, petition for a Writ of Certiorari to review the opinion and decision of the United States Court of Appeals for the Fifth Circuit.

DECISIONS, OPINIONS AND ORDERS BELOW AND APPENDICES

(A) The Judgment and opinion dated January 23, 1978 of the United States Court of Appeals for the Fifth Circuit is reported at 566 F.2d 1221 and is reproduced in the Appendix hereto at A.

(B) The order denying Petitioners' Petition for Rehearing and En Banc of February 23, 1978 was entered without opinion and is reproduced in the Appendix hereto at B.

(C) The order of March 22, 1978 granting the recall and stay of the mandate is reproduced in the Appendix hereto at C.

(D) and (E) The Memorandum Opinions and Orders of the United States District Court for the Eastern District of Texas, Beaumont Division, entered on August 31, 1970 and September 9, 1976 are unreported, and are reproduced in the Appendix hereto at D and E, respectively.

(F) The order of August 19, 1976 of the District Court Allowing Intervention is unreported and is reproduced in the Appendix at F.

(G) Denial of Rehearing.

(H) Notice of Appeal of Intervenors.

(I) U. S. Statutes.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

The Petition for Certiorari is presented prior to April 17, 1978 as required by the Court below in its March 22, 1978 order recalling and staying the issuance of the mandate pending action of this Court on the Petition for Certiorari. (See Appendix at C.)

QUESTIONS PRESENTED

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN HOLDING:

(a) THAT THE DISTRICT COURT DID NOT, BY ITS AUGUST 31, 1970 UNITARY SCHOOL SYSTEM DESEGREGATION ORDER, ESTABLISH A CONSTITUTIONAL SYSTEM OF PUPIL ASSIGNMENT, BUT RETAINED JURISDICTION SO AS TO REQUIRE THE DISTRICT COURT TO PERIODICALLY ADOPT A DIFFERENT PLAN TO ACHIEVE RACIAL BALANCE IN THE SCHOOLS, AND THEREBY ERRONEOUSLY HOLD DIRECTLY AND IRRECONCILABLY IN CONFLICT WITH DECISIONS OF THIS COURT INCLUDING, BUT NOT LIMITED TO:

(a) *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 429 (1976);

(b) *Swann* v. *Board of Education*, 402 U.S. 1, (1971);

(c) *Austin Independent School District* v. *United States*, 429 U.S. 990 (1977)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in the case and are set forth in the Appendix:

(a) Fourteenth Amendment to the United States Constitution (Appendix G);

(b) 20 U.S.C. 1702(a)(6), 1704, 1705, 1707, 1714, 1751, 1754 (Appendix I).

STATEMENT OF THE CASE

A. The School District, its Factual Policies and Pertinent Background.

The School District is heavily populated, practically transverses the west end to the south end of the City of Beaumont, Texas. The students exceeded 13,000 attending the nineteen schools at the outset of this case which originated in 1970. Population shifts have served to decrease the size of the student body. The 1970 desegregation order required that the school district permit a student attending a school in which his race was in the majority to choose to attend another school in which his race is in the minority, and with transportation furnished, with the transferees mandatorily be given priority for space at any district to which they elect to transfer, and not merely at the next closest school in which their race is in the minority. (Appendix D).

Intervenors constitute the class consisting of the almost 13,000 students with equal number of patrons. Over 8,000 Intervenors appeared personally and were allowed to intervene (Appendix F).

The Attorney General commenced this action in 1970 pursuant to the 1964 Civil Rights Act. The District Court held extensive hearings and adopted the August 31, 1970 desegregation order for the immediate implementation of a school integration plan designed to establish a unitary school system for the school district, and enunciated the framework of changes in the system rendering it unitary.

Nowhere in the August 31, 1970 desegregation order does the District Court retain jurisdiction over the School District, either directly or impliedly. No appeal was taken from that order. (Appendix D).

No patron or student sought to change that order. But six years later, on July 19, 1976, the Attorney General, on its own, brought action denominated "Motion for Supplemental Relief" (R. Vol. I, p. 75). This motion was filed despite no compiaint from any source, including HEW which had consistently certified compliance of the School District with the requirements of the 1964 Civil Rights Act.

At the hearing, the Government did not contend by pleading, witness, or by counsel at the bar that the District was operating contrary to the District Court's order of August 31, 1970. (R. Vol. II, p. 48-9).

The Motion for Supplemental Relief was contested by the School District with participation by Intervenors, who likewise opposed the Government's Motion. Intervenors were allowed to participate at the hearing, in the appeal, and in the event of additional litigation. (Appendix F).

The Court conducted a hearing August 16, 1976 and August 19, 1976. The School District produced witnesses and evidence and the Government failed to come forth with witnesses to support its naked Motion for Supplemental Relief.

The District Court denied the Government's Motion September 9, 1976 and entered its order accordingly. (Appendix E).

B. *The Orders of the District Court.*

The District Court on September 9, 1976 overruled the Government's Motion for Supplemental Relief in holding that the School District was in complete compliance with its prior desegregation order of August 31, 1970. Further, the Court noted the failure of the Government to establish that the August 31, 1970 desegregation order was unconstitutional.

The Court found that HEW was satisfied with each year's desegregative efforts of the School District from August, 1970 through the academic school years of 1977-8.

Further, the District Court accredited those desegregative results differing from those anticipated in 1970 to the resulting shifting residential patterns, moving into private schools by some students, and other factors beyond the control of the School District. Further, the District Court decreed that the School District had taken no affirmative action with segregative intent since its August 31, 1970 order, nor taken any action that would disestablish the unitary school system brought about by the August 31, 1970 desegregation orders. Also, the District Court decreed that the student assignments throughout the School District were consistently made without regard to race, color, or national origin, and the method of student class assignment had a definite desegregative effect.

Since the record was silent as to the required compliance by the Government with 20 U.S.C. 1758, the District Court assigned such failure as an additional ground of denial of the Government's Motion for Supplemental Relief. (Appendix E).

THE OPINION AND DECISION OF THE COURT OF APPEALS

On January 23, 1978 the Court of Appeals reversed the August 31, 1970 and the September 9, 1976 order of the District Court holding that the District Court had retained jurisdiction over the School District desegregation program in its August 31, 1970 order; and, that the Government had satisfied 20 U.S.C. 1758 with respect to providing notice to the School District of the details of any violation of equal educational opportunity or of equal protection of the law; and, that at no time prior to the September 9, 1976

order appealed from, had the District Court found that the School District had attained a unitary system.

In referring to *Swann* v. *Charlotte-Mecklenburg Board of Education,* 401 U.S. 1 (1971), the Court of Appeals decided that the fact of the existence of one race schools made it necessary to remand for additional findings of fact that would redetermine that the School District was unitary.

The Court of Appeals deemed the District Court's holding that the School District was unitary as being "critical" because once it is made, a Federal Court loses its power to remedy lingering vestiges of past discrimination absent a showing that either the School District's authorities or the State had deliberately attempted to fix or alter demographic patterns to affect the racial composition of schools, citing *Swann,* at page 32, footnote 4.

The Court of Appeals was dissatisfied with the District Court's 1976 reaffirming that the School District was in fact unitary, and decided that remand was necessary for findings of fact in order to determine whether the School District was a unitary school system. (Appendix A).

REASONS FOR GRANTING THE WRIT

School districts throughout this nation are faced with a necessary determination by this Court of the constitutional issue confronting schools by the periodic treatment by the Court of Appeals of the 1970 unitary school system established by the District Court.

This Court has in effect established a hands-off policy for Circuit Courts in school cases where a unitary system has been decreed by District Courts. But the decision of the Court of Appeals is in direct and irreconcilable conflict with your decisions. You have prohibited year-to-year, or periodic, inspections and restructuring of school plans

thought to achieve greater school racial balance overcoming population shifts, transfers to private schools, and conditions over which school districts can exercise no control in school cases where full compliance with Court-ordered unitary school desegregation plans that have been established and where no constitutional violation has occurred since the entry of that unitary school system order.

Additionally, this case offers this Court the excellent opportunity to construe for the benefit of school districts across the nation, students, and patrons alike, the congressional intent of the Equal Educational Opportunity and Transportation Act. 20 U.S.C. Sections 1701-1758 (1974), thereby correcting for all time the erroneous and conflicting holding of the Fifth Circuit Court of Appeals. The ever present concern of the populace cries out for your guidance on the issues of desegregation which have been enacted into law by the Congress in order to erase the "incompleteness" and "imperfections" of the remedial attempts to dismantle dual school systems and thus establish permanently

> "a clear, rational and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system." (20 U.S.C. 1702(a)(6).

QUESTIONS PRESENTED

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN HOLDING:

(a) THAT THE DISTRICT COURT DID NOT, BY ITS AUGUST 31, 1970 UNITARY SCHOOL SYSTEM DESEGREGATION ORDER, ESTABLISH A CONSTITUTIONAL SYSTEM OF PUPIL ASSIGNMENT, BUT RETAINED JURISDICTION SO AS TO REQUIRE

THE DISTRICT COURT TO PERIODICALLY ADOPT A DIFFERENT PLAN TO ACHIEVE RACIAL BALANCE IN THE SCHOOLS, AND THEREBY HOLD DIRECTLY AND IRRECONCILABLY IN CONFLICT WITH DECISIONS OF THIS COURT INCLUDING, BUT NOT LIMITED TO:

(a) *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 429 (1976);

(b) *Swann* v. *Board of Education*, 402 U.S. 1 (1971);

(c) *Austin Independent School District* v. *United States*, 429 U.S. 990 (1977)?

The brushing aside of this 1974 Act by the Court of Appeals surely is sufficiently compelling reason alone for this Court's enunciation of the congressional intent with that much needed meaningfulness that should foreclose the necessity of further periodic examinations of established unitary school systems in a fashion which will comport with your decisions in *Swann* v. *Board of Education*, 402 U.S. 1 (1971) and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 429 (1976).

The decision by the Court of Appeals in deciding a federal question in a way of conflict with the pertinent *Swann* and *Pasadena* decisions of this Court calls for an exercise of this Court's power of supervision.

A. It would be an unconstitutional act for the District Court and the school district to comply with the decision of the Court of Appeals. Repeated adoptions of different desegregation plans in order to increase racial balance to overcome factors beyond the control of the school district and the District Court in the face of having already achieved and established a unitary court decree desegregation plan would clearly be unconstitutional and in direct conflict with this Court's controlling decisions.

In specifying the immediate implementation changes in the overall school district by the 1970 desegregation order, the District Court set out in explicit detail criss-crossing student assignment plans for the District's nineteen schools and 13,000 students. The Government was satisfied that a unitary school system of constitutional dimensions of desegregative effect had been produced and took no appeal.

At the 1976 hearing, Government counsel conceded that no allegations were being made as to whether or not the School District was complying with the 1970 desegregation order.

This position was reiterated when Government counsel conceded that:

> "Once again, we are not questioning whether or not the plan was the most educationally sound or whether it was the most constitutionally acceptable, * * *." (R. Vol. II, p. 11).

Further emphasis was conceded by the Government regarding the School District's compliance with the 1970 unitary school system order of desegregation when counsel was asked:

> "The Court: All right, I would inquire of counsel for the Government whether or not you are making the contention that the School District in some way has failed to comply with the Court's order of August 31, 1970?"

To which Government counsel replied:

> "Mr. Jennings: No sir, we are not contending that they have failed to comply." (R. Vol. II 48-9).

The Government's motion for a different desegregation plan was untenably rhetorical because it produced no basis

in law or fact for the District Court to redecide the unitary system contrary to *Swann* and *Pasadena*.

The Court of Appeals' decision clearly conflicts with this Court's decisions in *Swann* and *Pasadena* touching the main thrust of what the Court of Appeals expects of the District Court.

Having once decreed in 1970 a unitary system, and having further found in 1976 that the unitary system was a fact accomplished, the District Court would have violated the intendments of this Court's *Swann* and *Pasadena* teachings by making further plans and new findings merely to sustain the established unitary system which it established in 1970.

Pasadena and *Swann* mandate the District Court and the Circuit Courts to recognize, as did the District Court, that it must be accepted that there are limits beyond which a Court may not go in seeking to dismantle vestiges of a dual school system.

Below, and in *Pasadena*, there was adopted in 1970 a plan that:

> "established a racially neutral system of student assignments in the school systems."

This Court in *Pasadena* held:

> "Having done that, we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority." *Pasadena*, 427 U.S. 424 at 435.

Further, this Court in *Pasadena* guided Courts and school districts thusly:

> "There was also no showing in this case that those post 1971 changes in the racial mix of some Pasadena schools

which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants." *Pasadena*, 427 U.S. at 435.

The School District and the District Court have squarely met headon this Court's decisions in *Pasadena* and *Swann*, particularly where you say:

"* * * we think this case comes squarely within the sort of situation foreseen in Swann.

"It does not follow that communities served by (unitary) systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U.S. at 31-32." 427 U.S. at 436.

And, further, you taught District and Appellate Courts and School Districts alike in *Pasadena* that:

"It may well be that Petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann. * * * But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the School District to rearrange its attendance zones each year so as to ensure that the racial mix desired by the Court was maintained in perpetuity. For once having implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court has fully performed its function of providing the appropriate remedy for previous racially disciminatory attendance patterns." Pasadena, 427 U.S. at page 436, 437.

The District Court clearly complied with your foregoing standards for the treatment of once established unitary school systems.

However, it is readily obvious that the Court of Appeals is following the erroneous positions of the District Court in *Pasadena*, because the Court of Appeals would erroneously require the District Court to rehear the case, bring on witnesses, and make additional and new findings of fact. But the District Court had already done what this Court deemed to be the appropriate action, and the Fifth Circuit Court of Appeals has erroneously decreed it necessary to make further and additional findings in order to constitutionally support what it had previously established — the desegregated unitary school system.

Contrary to the Fifth Circuit's decision that the District Court should act in such a way as to comply with your *Swann* decision, that is just what the District Court has ultimately achieved.

No patron or pupil has said that any pupil has been discriminated against or excluded from any of the School District's schools because of racial considerations. Yes, *Swann* and *Pasadena* both support the District Court's decision and reject that of the Fifth Circuit.

Once a school district has constitutionally, as here, achieved a unitary school system, it has fully complied with the mandatory teachings of what is expected in achieving that desirable unitary system. Having accomplished the unitary system, the school district is not to be subjected to

new and different emotional and economic upheavals simply because some Government counsel files a motion entitled "Supplementary Motion for Relief." Thereafter, unitary achievement established and ordained, our federal judiciary must not periodically order a new crop of adjustments in the racial structure of student bodies. To the same effect is the prohibition of doing so every five or six years.

Where racially neutral geographic assignment exists, there is no constitutional prohibition against its presence merely because race mixture rises to racial imbalance. This was determined by this Court in *Milliken* v. *Bradley,* 418 U.S. 717 (1974) when you decided that the existence of predominantly white schools located near schools which were predominantly black in neighboring school districts does not in itself create a violation of the constitutional demand for the removal of racial imbalance. Cf. *Pasadena.*

The path of racial balance which is constitutionally viable is being consistently followed and adhered to by this Court. Cf. *Austin Independent School District* v. *United States,* 429 U.S. 990 (1977).

Yet the Fifth Circuit and the Government would invalidate the 1970 order though no appeal was taken therefrom.

In moving for supplemental relief, the Government misconceived the constitutional requirements of school desegregation which this Court laid down in *Brown I and II,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955), respectively. The Circuit Court of Appeals misapplied your requirements. The District Court and the School District in 1970 implemented a unitary school plan which disestablished segregation. In processing its affirmative duty to erase racial discrimination and all its shades and phases from the system, the School District completed the circle which it was compelled to achieve. In so doing, it carried into

effect that quality of compliance which this Court has consistently followed since *Brown I and II,* and met the test imposed by this Court in *Milliken* v. *Bradley,* 418 U.S. 717 (1974); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Spencer* v. *Kuyler,* 404 U.S. 1027 (1972); *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973); *Bradley* v. *School Board of Richmond,* 412 U.S. 92 (1973).

In erasing the old and statutory mandatory segregation on August 31, 1970, the District Court, and the School Board alike, achieved a *desegregated unitary system* which has been faithfully maintained. The Government conceded no acts of discrimination by the system and only wanted a different order from the August 31, 1970 order from which it took no appeal. This Court has consistently shown in its decisions since *Brown I and II* that such an attack as here made by the Government against the 1970 desegregation order is untenable, irrespective that no appeal was taken from that order by the Government.

Either the Government misunderstands your consistent decision after decision guidelines, or else it chooses to disregard them just as it has done in its failure to acknowledge the 1974 Act of Congress set forth in 20 U.S.C. 1702(a)(6), 1704, 1705, 1707, 1714, 1751, and 1754. The District Court, having in 1970 found segregation, and having ordered the School District to erase it by the establishment of the unitary system, did all that this Court has consistently mandated in *Brown I and II, Swann, Spangler, Austin, Milliken, Dayton, Green.* Each of your decisions shed more light to chart the Government's way, yet the Government chooses another and inexplicable route for the District Court and the School District to comprehend and follow.

In dealing with segregation, as this Court has done since 1954, the District Court and the School District have likewise dealt with it with a desegregation plan that has

functioned successfully, recognizing all the while that the problem of segregated residential and migratory patterns were the root of the dilemma.

In Section 1704 of 20 U.S.C., the Congress clearly informed the nation and the Government alike that the failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools, shall not constitute a denial of equal educational opportunity, or equal protection of the laws. But the Government looks the other way and demands some other system of pupil assignment in its desire for supplemental relief.

To similar effect and import is Section 1705 of the 1974 Act dealing with quality and constitutional education in the assignment of students to the school nearest his place of residence. But the Government chose to turn its face away from that constitutional enactment also.

The Government has conceded to some extent that population shifts have wrought some changes in the district since the 1970 order, but, nevertheless ignores Sections 1707, 1714 and 1754 of the 1974 Act which accommodates residential shifts after the District Court has established a unitary school system having no vestiges of a dual system. Clearly, the Congress intended that no education agency thereafter would be impelled by any Court, department, or agency of the United States (the Attorney General is included) to formulate, or implement any new desegregation plan, or modify or implement any modification of the Court adopted and approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

The District Court, in denying the Government's Motion for Supplemental Relief, acted consistently with Section 1751 of the 1974 Act which states that:

> "No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

The District Court and the School District each complained because of the Government's failure to give the District that character and degree of notice which would timely permit the School District ample opportunity for community participation in the development of such a remedial plan contemplated in Section 1758 of the 1974 Act. The District Court also felt, therefore, that it was prohibited under that Act from granting the Government's Motion for Supplementary Relief despite its having achieved a constitutional unitary school desegregated system which met the requirements of *Swann, Pasadena, Millikan, Bradley, Brown I and II, Green, Keyes,* and *Austin.*

Yet the Court of Appeals reversed and remanded, holding that no judicial ruling had been made concerning the achievement of a unitary system, and that the Court had retained jurisdiction, leaving the case open, and that Section 1758 was not a controlling factor. Clearly the Court of Appeals misperceived the District Court's finding and establishment of a unitary system with equal force of its misapplication of Section 1758 because the 1970 order clearly established the unitary system and closed the case.

The 1974 provision of Section 1758 specifically requires for fulfillment by the Government of the notice requirement before modification of a Court approved plan or the enforcement of a plan could be processed anew.

The problem of not recognizing the efficacy of congressional edict lies equally with the Government and the

Court of Appeals. This law is meaningful and should be given full faith and credit by both the Government and the Court of Appeals. Otherwise, confusion prevails because no one can afford to speculate today that the Government and the Circuit Court will again ignore its intended application, because tomorrow they may raise it from yesterday's expected, assumed, and contemplated status of invalidity.

Since the School District operates in compliance with the Constitution, the District Court had no alternative but to buttress its 1970 unitary desegregated school plan on technical grounds to declare that the Government's failure to give the statutory required notice of the details of some form of violation had not been given the School District and for that reason also the Motion for Supplemental Relief was found wanting, and therefore was denied.

The Fifth Circuit Court of Appeals was in error in reversing and remanding for fact findings to be incorporated in a new and different adopted desegregation plan.

This Court should take this occasion to inform the Court of Appeals that Congressional Acts and this Court's prior decisions must be regarded with determinations and spelled out in the Court of Appeals' decision in a way that is in accord therewith. Hereafter, no call therefore should be made to this Court for an exercise of its power of supervision to compel compliance therewith.

CONCLUSION

This case presents both the issues of the constitutionality of the neighborhood school, and the issue of relitigation where, once having established a unitary school system which has desegregated and erased every vestige of segregation by final decree closing the case.

Both of these issues are of national importance and can never be settled without the exerise of this Court's power of supervision over the Fifth Circuit Court of Appeals.

PRAYER

Petitioners pray that a Writ of Certiorari be granted to review the Judgment and Opinion of the Court of Appeals for the Fifth Circuit.

Very respectfully submitted,

LEON PETTIS
Goodhue Building
Beaumont, Texas 77701

JOE H. TONAHILL
P. O. Box 670
Jasper, Texas 75951

By JOE H. TONAHILL
Joe H. Tonahill
Counsel of Record

Attorneys for Petitioners

PROOF OF SERVICE

I, Joe H. Tonahill, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the foregoing Petition for Certiorari on counsel for Respondents, as provided in Rule 33, by depositing same in the United States mail on April 6th, 1978, addressed to Judge Wade H. McCree, Jr., the Solicitor General, Department of Justice, Washington, D.C. 20530, Hon. Mark L. Gross, Hon. William C. Graves, Hon. Drew S. Days, III, Department of Justice, Washington, D.C. 20530; Hon. Tanner T. Hunt Jr., 624 Petroleum Building, Beaumont, Texas 77701, and Hon. Leon Pettis, Goodhue Building, Beaumont, Texas 77701.

JOE H. TONAHILL,
Counsel of Record

IN THE

Supreme Court of the United States

OCTOBER TERM 1977-8

No. .....

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE APPENDIX

(A, B, C, D, E, F, G, H, I)

APPENDIX A

U.S. v. SOUTH PARK INDEPENDENT SCHOOL DIST.

Cite as 566 F.2d 1221 (1978)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
SOUTH PARK INDEPENDENT
SCHOOL DISTRICT ET AL.,
Defendants-Appellees.

Nos. 76-3669, 77-2872.
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
Jan. 23, 1978.

Appeal was taken from orders of the United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, denying motion of the United States for supplemental relief requesting district court to adopt a new plan of student desegregation in school district and denying Government's application for an order to show cause why school district should not comply with earlier desegregation order, allegedly violated in the reassignment of principals. The Court of Appeals, Fay, Circuit Judge, held that: (1) where district court's holding that school district was a "unitary" school system was not detail enough to show whether existence of primarily one-race schools within district was result of present or past discriminatory action, remand was required for supplemental findings, and (2) where predominantly black schools in district had black

principals and the other schools had white principals, there facially appeared to be an unconstitutional assignment of principals, and specific findings of fact were necessary to support conclusion that reassignment of principals was done without regard to the race of the individuals involved.

Reversed and remanded.

1. Schools and School Districts — 13

Once finding is made that school district has a "unitary" school system, federal

court loses its power to remedy lingering vestiges of past discrimination absent a showing that either the school authorities or the state have deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools.

2. Schools and School Districts — 13

Where, under 1970 desegregation order, district court retained jurisdiction of school system and no finding had ever been made as to the attainment of a "unitary" system by the school district, case remained "active" under the district court's jurisdiction, and the parties were bound by intervening opinions of the Court of Appeals and the United States Supreme Court.

3. Federal Courts — 941

Where district court's holding that school district was a "unitary" school system was not detailed enough to show whether existence of primarily one-race schools within the

district was result of present or past discriminatory action, remand was required for supplemental findings.

4. Schools and School Districts — 13

Where district court had previously assumed and retained jurisdiction over school system and no judicial ruling had been made concerning attainment of a "unitary" system, and case had not been closed, statute providing that before any court shall enter an order for enforcement of modification of court-approved desegregation plan, the local educational agency should be provided with notice of details of violation and given reasonable opportunity to develop a remedial plan was not controlling. Equal Educational Opportunities Act of 1974, § 259, 20 U.S.C.A. § 1758.

5. Schools and School Districts — 13

In school desegration case, Government complied with the basic requirements of statute providing that before any court shall enter an order for the enforcement or modification of any court-approved desegregation plan, the local educational agency shall be provided with notice of the details of the violation and given a reasonable opportunity to develop a remedial plan. Equal Educational Opportunities Act of 1974, § 259, 20 U.S.C.A. § 1758.

6. Schools and School Districts — 141(1)

Assignment of principals alone is not necessarily the important factor, and one must look at racial composition of school district's entire staff, but it would be unconstitutional for a school district to assign principalships based on the race of the individuals involved.

7. Schools and School Districts — 141(1)

Where predominantly black schools in district had black principals and the other schools had white principals, there

facially appeared to be an unconstitutional assignment of principals, and specific findings of fact were necessary to support conclusion that reassignment of principals was done without regard to the race of the individuals involved.

Alexander C. Ross, Thomas M. Keeling, Daniel L. Jennings, U.S. Dept. of Justice, Washington, D.C., John H. Hannah, Jr., U.S. Atty., Tyler, Tex., J. Stanley Pottinger, Brian K. Landsberg, William C. Graves, Mark L. Gross, Attys., Appellate Section, Civil Rights Div., U.S. Dept. of Justice, Washington, D.C., Daniel J. McNulty, Asst. U.S. Atty., Beaumont, Tex., Drew S. Days, III, Asst. Atty. Gen., Frank D. Allen, Jr., Atty., Washington, D.C. for plaintiff-appellant.

John L. Hill, Atty. Gen., Pat Bailey, Asst. Atty. Gen., Austin, Tex., for Texas Educ. Agency et al.

Tanner T. Hunt, Jr., Beaumont, Tex., for South Park Ind. Sch. Dist.

Joe H. Tonahill, Jasper, Tex., for Parents & Students.

R. Leon Pettis, Beaumont, Tex., for defendants-appellees.

Appeals from the United States District Court for the Eastern District of Texas.

Before COLEMAN, TJOFLAT AND FAY, Circuit Judges.

[1223]

U.S. v. SOUTH PARK INDEPENDENT SCHOOL DISTRICT
Cite as 566 F.2d 1221 (1978)

FAY, Circuit Judge:

The questions before us today deal with the attempts of the South Park Independent School District (SPISD) to

desegregate their school system. The government contends that a 1970 desegregation plan ordered by the district court and implemented by the SPISD is not having its intended results, and, consequently, further remedial steps should be taken. The district court rejected this argument, and in the process ruled that the SPISD is a "unitary" school system. We reverse the ruling of the district court and remand for further findings of facts.

I. PROCEDURAL HISTORY

The history of the two cases currently on appeal begins on August 31, 1970, when the United States District Court for the Eastern District of Texas entered an order implementing a school integration plan. The order provided for the desegregation of students under a neighborhood school plan by means of attendance zones encompassing three high schools, four junior high schools, and eleven elementary schools. The order established as the only general exception to the neighborhood school assignment system a majority-to-minority transfer policy wherein a student attending a school in which his race is in the majority may elect to attend another district school in which his race is in the minority.[1] The order also provided for the desegregation of faculty and staff of the district in such a way as to provide a ratio of black teachers and staff to white teachers and staff in each district school that would be substantially the same as the then existing district-wide racial ratio of faculty and staff — allowing a five percent tolerance factor. This order of the district court became final without appeal.

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[1] Students electing majority-to-minority transfer were to be given transportation if they desire it (assuming the same is available from district-controlled sources.) Also, such transferees were to be given priority for space in any district school to which they elect to transfer — not merely at the next closest district school at which their race was in the minority.

On July 19, 1976, the United States filed a Motion for Supplementary Relief which requested the district court to adopt a new plan of student desegregation. Statistics reflected that four schools which had been designated for black students under the dual system[2] had been continuously attended solely by black students. In addition, the government statistics showed that seven schools which were all white under the dual system remained virtually all white. In sum, the government statistics pointed out that during the 1975-1976 school term 75.1% of all black students in the system attended schools that were 92% or more black and 77.5% of all white students attended schools which were 86% or more white.

On July 29, 1976, the school district filed a reply to the Government's motion urging several reasons for denial of the motion. Their argument was primarily that the school district had remained in full compliance with the 1970 order; that agencies of the United States had consistently approved the school district's implementation of that order since its entry; that desegregative results differing in any way from those anticipated in 1970 were the result of changed residential patterns beyond the control of the school district; and that since 1970 the school district had taken no affirmative action with segregative intent, nor refrained from taking any action within the scope of the court order which, if taken, would have increased desegregative results.

The first appeal before us revolves around the district court's order of September 16, 1976, denying the United States' motion. The court set forth two reasons for its

[2] Until the late 1950s, the South Park Independent School System unconstitutionally operated pursuant to a Texas law a dual school system which required black and white students and faculty assigned to separate schools.

denial. First, the government failed to satisfy the requirements of 20 U.S.C. § 1758 with respect to providing notice to the school district of the details of any violation of equal educational opportunity or of equal protection of law.[3] Therefore, the defendant had not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. The second reason the court proffered was that independent of § 1758 there still existed no basis for relief since the 1970 plan had desegregated the school district thereby dissolving all vestiges of a dual school system. By so ruling, the district court in effect said that the South Park Independent School District was a "unitary" school system.

The second appeal which we are to review centers around the denial of the government's application of August 8, 1977 for an order to show cause why the defendants should not comply with the August 31, 1970 order. This application alleged that the school board had reassigned its principals

[3] 20 U.S.C. § 1758 provides:
Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

for the 1977-78 school year in a racially discriminatory manner in violation of the 1970 order. The government provided statistics showing that in the 1976-77 school year the race of the principals in each of the school district's seventeen schools was in all instances the race of the majority of students. Each of the five black principals in the district was assigned to one of the five schools attended exclusively or predominately by black students. All the rest of the schools had white majorities in student attendance, and each had a white principal.

The school district took the position that the principal assignments of 1977-78 did not alter the desegregation of faculty and staff in any school building; that no district school was identifiable as one intended solely for black students or white students as a result of such principal reassignment; that the principal reassignments were not racially motivated; and that such assignments were not violative of the 1970 order.

On August 16, 1977, the district court entered an order denying the government's application for a show cause order. The court found that the school district had acted in compliance with the 1970 order because the reassignment of principals did not alter the racial composition of the entire staff of any school so as to indicate that a particular school is intended for black students or white students. Further, the district court held that the reassignments does not in any way result in less integration of staff members.

II. THE STUDENT CASE

The government's first appeal contests the propriety of the district court's denial of its motion for the implementation of a new school desegregation plan. In denying the government's motion, the district court ruled that the government had failed to follow the procedural steps mandated by 20 U.S.C. § 1758, and, in the alternative, that further relief was unnecessary because the South Park Independent School District had become a unitary school system.

[1, 2] Initially, we shall discuss the court's holding that the SPISD is a "unitary" school system. This finding is critical because once it is made a federal court loses its power to remedy the lingering vestiges of past discrimination absent a showing that either the school authorities or the state had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools. *Swann* v. *Board of Education*, 402 U.S. 1, 32, 91 S.Ct. 1267, 1284, 28 L.Ed.2d 554 (1971).[4] Even

though the Supreme Court's decision in *Swann* was rendered subsequent to the 1970 desegregation plan, it nevertheless controls the disposition of this case. To understand

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[4] The Supreme Court also said in *Swann* that:

> It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school auhorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

402 U.S. at 31-32, 91 S.Ct. at 1283-84. This point was reemphasized in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (June 28, 1976), when the Supreme Court stated:

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-37, 96 S.Ct. at 2705.

fully why this is so, one must keep in mind that under the original 1970 order the district court retained jurisdiction over the South Park school system (this retention of jurisdiction was a normal and necessary procedure taken to insure the implementation of the plan and the achievement of the goal — a "unitary" school system). At no time prior to the 1976 order presently under attack, had a finding been made by the district court as to the attainment of a "unitary" system by the SPISD. Thus, the case remained "active" under the district court's jurisdiction. Given these circumstances, the parties are bound by intervening opinions of the Court of Appeals and the United States Supreme Court, and there have been many such opinions outlining "new guidelines and requirements" in certain situations.

The present posture of this case is that we must review the 1976 order and determine if it is in accord with the mandate of *Swann*. The Supreme Court said in *Swann* that the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. *Id.* at 24, 91 S.Ct. 1280. However, the Court was very careful to point out that situations justifying one-race schools are rare and must be carefully scrutinized.

> [I]t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria

> of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Id. at 26, 91 S.Ct. at 1281.

[3] In allowing the existence of one-race schools in limited situations, the *Swann* opinion emphasized that findings should be made demonstrating that their existence is not the result of present or past discriminatory action. The district court's holding that the SPISD is a "unitary" school system is not detailed enough to show us whether or not the school system meets this *Swann* requirement. For this reason, it is necessary to remand this case to the district court for supplemental findings of fact in order to determine whether or not the SPISD is in fact a "unitary" school system.

[4, 5] The district court also denied the government's motion for implementation of a new desegregation plan because the government failed to follow the requirements of 20 U.S.C. § 1758. Section 1758 provides that before any court shall enter an order for the enforcement or modification of any court-approved desegregation plan, the local educational agency should be provided with notice of the

details of the violation and given a reasonable opportunity to develop a remedial plan. We reject the district court's application of § 1758. The district court had previously assumed and retained jurisdiction over the school system. No judicial ruling had been made concerning the attainment of a "unitary" system. The case had not been closed. Under the facts of this case, the statute is not controlling; but, if it were, reversal would nevertheless be mandated because the government has complied with its basic requirements. In a letter dated April 15, 1976, the Department of Justice wrote to counsel for the school district advising that the Department felt additional steps were necessary to bring the district into compliance with federal law. (R. 103-106). The Department pointed out in this letter that the one-race, or predominately one-race, status of twelve of the district's schools was the primary concern of the government. The letter also explained that the Department of Justice felt that the particular feeder pattern of elementary to junior high to senior high schools used by the school district was the chief cause for these one-race schools. Furthermore, the letter explained that the Department was writing in order to state the reasons it felt the SPISD was not in compliance with federal law and to afford the Board of Education an opportunity to remedy the situation. A motion for supplemental relief was not filed until after the Department of Justice had received a response from the school district explaining that a significantly greater amount of time was needed to develop a new desegregation plan. We are unable to see how the government could have better complied with the notice provisions of the statute, and, therefore, the district court's denial of the government's motion on these grounds was error.

III. THE PRINCIPAL REASSIGNMENT CASE

In the principal reassignment case, the government has

brought forth statistics from which one could infer that the principal assignments were based upon the race of the individuals involved. The school district of course denies this inference. The district court apparently treated either the government's motion or the defendant's response to it as a motion for summary judgment, and, without a hearing, denied the government's motion.

[6] We feel compelled to reverse the entry of the summary judgment, but, in so doing, we recognize that the assignment of principals alone is not necessarily the important factor but rather one must look at the racial composition of a school district's entire staff. We are not ready to hold that each particular level of employment in a school system must have a particular racial composition. At the same time, however, we also recognize that in a community individuals might attach a certain degree of importance to the position of principal, and that it would be unconstitutional for a school district to assign principalships based upon the race of the individuals involved. In *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1970), this court explained:

> Staff members who work directly with children, and professional staff who work on the administrative level will be hired, *assigned,* promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

Id. at 1218 (emphasis added).

[7] We are not presently in a position to find that the SPISD is assigning principals in a manner violative of the constitution, but we do feel it is necessary to reverse the entry of the summary judgment. The district court's order lacks the necessary findings of facts justifying what would facially appear to be the unconstitutional assignment of

principals based upon race. We remand the case to the district court for specific findings of facts, if such exist, supporting the court's conclusion that the reassignment of principals was done without regard to the race of the individuals involved.

IV. CONCLUSION

In conclusion, we want to point out that we do not view these cases as a situation where a district court has refused to rule, or as a situation where we need implement our own desegregation plan for the school district. We recognize that the issues involved are extremely difficult, and that the ultimate solutions will affect the lives of most individuals living within the communities involved. The district judge is a very learned, able, and conscientious judge, and is fully capable of handling these matters.

Reversed and Remanded.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
February 23, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-3669 — U.S.A. v. SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.

Dear Counsel:
This is to advise that an order has this day been entered denying the petition( ) for rehearing** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauck
Deputy Clerk

**on behalf of appellees, South Park Indep. School Dist., bmh

cc: Messrs. Brian K. Landsberg
William C. Graves
Mr. Mark L. Gross
Mr. Tanner T. Hunt, Jr.
Mr. Joe H. Tonahill
Mr. Leon Pettis

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3669

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

ORDER

( ) The motion of ..... for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellees for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 17, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

PETER FAY
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT
Defendant.

CIVIL ACTION No. 6819

ORDER FOR IMPLEMENTATION OF SCHOOL INTEGRATION PLAN

The Court having heard testimony in open hearing and having considered the arguments of counsel for the United States of America and for Defendant South Park Independent School District with respect to the immediate implementation of a school integration plan designed to establish a unitary school system in South Park Independent School District,

It is ordered that the Board of Trustees of South Park Independent School District proceed to implement, not later than September 2, 1970, the following segregation plan:

DESEGREGATION OF STUDENTS

The neighborhood School Plan submitted by the district is hereby adopted by the Court, with certain modifications designed to increase the overall percentage of integration

at particular schools while conforming more exactly to the appropriate capacities of those schools.

Senior High Schools:

1. Forest Park High School (grades 9-12) — All students in the district residing west of Interstate 10 will attend Forest Park High School.

2. Hebert High School (grades 9-12) — All students in the district residing east of Interstate 10 to the intersection of Washington Boulevard and Waco Street, and west of a line extending south on Waco Street to Southerland Street; east on Southerland Street to Marie Street; south on Marie Street to Rena Street; east on Rena Street to Opal Street; south on Opal Street to Virginia Street; west on Virginia Street to Beale Street; south on Beale Street and along a line due south across Loop 251 to an intersection with the Beaumont city limit line, and along a line due south to an intersecting point with the southermost boundary line of South Park Independent School District; all students whose residences face toward Opal Street within this school attendance area will attend South Park High School; all students whose residences face toward Beale Street within this attendance area will attend Hebert High School; all students whose residences are located on the west side of Waco and Marie Streets within this attendance area will attend Hebert High School; all students whose residences are located on the east side of Waco and Marie Streets within this attendance area will attend South Park High School; all students whose residences are located on the north side of Southerland, Virginia, and Rena Streets within this attendance area will attend South Park High School; all students whose residences are located on the south side of Southerland, Virginia and Rena Streets within this attendance area will attend Hebert High School.

3. South Park High School (grades 9-12) — All students in the district residing east of the Hebert High School attendance line, including Hildebrandt Road and the Cardinal Meadows addition, will attend South Park High School.

Junior High Schools:

1. Memorial Junior High School (grades 6-8) — All students in the district residing within the following described area will attend Memorial Junior High School: All students in Grades 6, 7 and 8 who live in the area described as beginning at Calder Avenue and the District's eastern line, proceeding west on Calder Avenue to Dowlin Road, then north on Dowlin Road to Ivanhoe, extending Ivanhoe west slightly northwest of Evangeline Drive to intersection with Major Drive, proceeding north on Major Drive to the South Park Independent School District district line, including all who live on Major Drive; the east and south boundary line of this area shall be Interstate 10.

2. Marshall Junior High School (grades 6-8) — All students in the district residing north of the boundary line describing the Memorial Junior High School attendance area will attend Marshall Junior High School.

3. Odom Junior High School (grades 6-8) — All students in the district residing within the Hebert High School attendance area described above will attend Odom Junior High School.

4. MacArthur Junior High School (grades 7-8) — All students in the district residing within the South Park High School attendance area described above will attend MacArthur Junior High School.

Elementary Schools:

1. West Oakland Elementary School (grades 1-5) — All students in the district residing within an area described

as beginning at Washington Boulevard and south on Fannett Road to the Loop, then west and north on the Loop to where Roberts Avenue would intersect, then east on Roberts Avenue to Fourth Street, south on Fourth Street to the point of beginning, will attend West Oakland Elementary School. All 6th grade students in this attendance area will attend Fehl Elementary School.

2. Fehl Elementary School (grades 1-6) — All students in the district residing within the area bounded by Roberts Avenue, Interstate Highway 10, T.&N.O. Railroad tracks and Fourth Street will attend Fehl Elementary School.

3. Caldwood Elementary School (grades 1-5) — All students in the district residing within the area described as beginning at the point where Interstate 10 crosses the T.&N.O. railroad tracks and proceeding south on Interstate 10 to the Caldwood cutoff, following Caldwood cutoff west and north to Hooks Street, following Hooks Street east and north to the District boundary line, said area to include all of Ida Reed Addition, will attend Caldwood Elementary School.

4. Sallie Curtis Elementary School (grades 1-5) — All students in the district residing within the area described as beginning at Calder Avenue at the point where it intersects the Caldwood cutoff, proceeding west on Calder to Dowlin Road, then proceeding on Dowlin Road to Prutzman Road, then west on Prutzman to Shakespeare, then due north to Gladys, then east on Gladys to Central Drive, which is the east boundary line of the school district, said attendance zone to include all students living in Audubon Place, and on Sheridan, Candlestick and Fenwich Streets, will attend Sallie Curtis Elementary School.

5. Regina-Howell Elementary School (grades 1-5) — All students in the district residing within the area north

of the northern boundary line of the Sallie Curtis attendance area and east of Dowlin Road to the school district line will attend Regina-Howell Elementary School.

6. Amelia Elementary School (grades 1-5) — All students in the district residing in an attendance zone identified so as to include all areas west of the previously described elementary attendance zones and to the school district boundary line, south to Walden Road and to include Walden Road, will attend the Amelia Elementary School.

7. Tyrrell Park Elementary School (grades 1-6) — All students in the district residing in the area lying west of the Bingman Elementary School neighborhood boundary line and south of Loop 251 and Interstate 10 and Walden Road, but not including Walden Road, will attend Tyrrell Park Elementary School.

8. Giles Elementary School (grades 1-6) — All students in the district residing in the area described as beginning at the intersection of the T.&N.O. railroad tracks and Washington Boulevard, proceeding east on Washington Boulevard to Highland Avenue, then south on Highland to Elgie Street, west on Elgie to Kenneth Street, south on Kenneth to Brockman Street, west on Brockman to Ector Street, south on Ector to Essex Street, west on Essex to the T.&N.O. railroad tracks, north on the T.&N.O. railroad tracks to the point of beginning, will attend Giles Elementary School.

9. Pietzsch Elementary School (grades 1-6) — All students in the district residing in the area described as beginning at the Neches River, at the South Park school district line, and proceeding south along Sycamore Street to KCS railroad tracks, then west to the intersection of Port Arthur Highway and Highland Avenue, along Highland south to Elgie Street, west on Elgie to Kenneth Street, south on

Kenneth to Brockman Street, west on Brockman to Ector Street, south on Ector to Essex Street, west on Essex to the T.&N.O. Railroad tracks, south on the T.&N.O. railroad to Virginia Street, east on Virginia to Kenneth Street, south on Kenneth to Shell Street, east on Shell (which street later becomes Alabama Street), and then east to a point beyond the Port Arthur Highway to the eastern boundary line of the South Park School District, will attend Pietzsch Elementary School.

10. Bingman Elementary School (grades 1-6) — All students in the district residing in the area described as south of the Pietzsch Elementary School boundary line and east of the Blanchette Elementary School boundary line, hereinafter described, and bounded on the north by Shell, Alabama, Virginia and Kenneth Streets, bounded on the west by Flamingo Street extended to Florida Street, east on Florida to City of Beaumont limit line, south to the South Park school district boundary line, including all of Hilderbrandt Road, then east to the eastern boundary line of the South Park Independent School District, will attend Bingman Elementary School.

11. Blanchette Elementary School (grades 1-4) — All students in the district residing in the area described as beginning at the Fannett Road and Washington Boulevard, south along Fannett Road to Loop 251, east on Loop 251 to Florida Street, east on Florida to a point directly south of Flamingo, from that point north to Florida and Virginia, east on Virginia to the T.&N.O. railroad tracks, north on the T.&N.O. railroad tracks to Washington, west on Washington to the point of beginning, will attend Blanchette Elementary School. All 5th grade students residing within the Blanchette attendance area will attend either Caldwood, Curtis, Regina-Howell or Amelia schools, as the school district shall direct.

Majority-to-Minority Transfer Policy:

The only general exception to the neighborhood school assignment system shall be the majority-to-minority transfer policy as defined by recent appellate decisions. That is, the school district shall permit a student attending a school in which his race is in the majority to choose to attend another district school in which his race is in the minority. Moreover, all students so transferring shall be given transportation, if they desire it, assuming such transportation is available from district-controlled sources. Further, such transferees must be given priority for space at any district school to which they elect to transfer, not merely at the next closest school in which their race is in the minority.

Graduating Seniors:

Inasmuch as this litigation was initiated only a short time prior to the beginning of the Fall school term and because of the inconvenience and expense to parents whose children will be high school seniors in the 1970-71 school year, the single special exception to the neighborhood school assignment system will be to allow all students who will be graduating seniors in the 1970-71 school term to elect to attend the district high school which they attended at the conclusion of the 1969-70 school term. This special exception will also apply to residents of other school districts whose children attended South Park district high schools at the conclusion of the 1969-70 term; who will be seniors in South Park district high schools in the 1970-71 term; and who had completed all necessary transfer requirements into South Park district prior to June 1, 1970.

DESEGREGATION OF FACULTY AND STAFF

All principals, assistant principals, teachers, teacher aids, coaches and other staff who work directly with students in one of the district schools on a day-to-day basis shall be

assigned so that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. For the 1970-71 school year South Park Independent School District will assign its staff as described above so that the ratios of black to white teachers and staff in each district school are substantially the same as the present-district-wide ratio of faculty and staff, allowing a five (5%) per cent tolerance factor. Moreover, in the event special certification requirements at the senior high school level make it impossible to meet this ratio test with the present faculty, the school district will in the course of employing new teachers during the school year act so as to correct any deviations presently existing with respect to such ratio.

/s/ JOE J. FISHER
United States District Judge

Date: August 31, 1970.

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT

Defendant.

CIVIL ACTION No. 6819

ORDER

On August 31, 1970, this Court entered an order for implementation of a school integration plan in the cause above numbered and styled. Such order provided for the immediate desegregation of students under a comprehensive neighborhood school plan by means of specific attendance zones encompassing three high schools, four junior high schools, and eleven elementary schools.

The order also established, as the only "general exception" to the neighborhood school assignment system, a majority-to-minority transfer policy, wherein a student attending a school in which his race was in the majority could elect to attend another district school in which his race was in the minority. Students electing such transfer were to be given transportation if they desired it, assuming the same was available from district-controlled sources. Further, such transferees were to be given priority for space in any district school to which they elected to transfer under the majority-to-minority exception, not merely in the next closest district school at which their race was in the minority.

Finally, the order provided for the immediate desegregation of faculty and staff of the district in such a way as to assure that the ratios of black teachers and staff to white teachers and staff in each district school would be substantially the same as the then existing district-wide racial ratio of faculty and staff, allowing a five percent tolerance factor.

The order of the Court filed August 31, 1970, became final without appeal.

By letter of April 15, 1976, the Department of Justice wrote to counsel for the school district advising that, in the opinion of that office, "additional steps need to be taken in order to bring the district into compliance with Federal law." The Department of Justice requested that such "additional steps" — otherwise unspecified — be implemented with the beginning of the 1976-77 academic school year. Such letter contained the first indication of dissatisfaction by an agency of plaintiff since entry of the order on August 31, 1970.

Following a preliminary study of the educational and economic effects of attempting to implement a comprehensive new plan of student integration in the 1976-77 academic school year, counsel for the school district, at the direction of its board of trustees, wrote to the Department of Justice by letter of June 24, 1976, pointing out that full consideration and implementation of an acceptable alternate plan for student integration could not be accomplished in the brief time remaining without seriously disrupting the district's educational program for academic school year 1976-77. However, the board proposed a timetable wherein it would determine, by February 15, 1977, the most educationally sound and economically feasible plan for accomplishing student integration in the district, which plan would be implemented with the beginning of academic school year 1977.

The Department of Justice made no direct response to defendant's letter of June 24, 1976. However, on July 19, 1976, plaintiff filed a motion for supplementary relief, with memorandum attached, seeking entry of order requiring defendant to "develop, adopt and implement a comprehensive school desegregation plan" — again unspecified. As in the initial proceedings, this Court has jurisdiction of the parties and over the subject matter of this litigation.

On July 29, 1976, defendant filed reply, with memorandum attached, to plaintiff's motion, praying that such motion be in all things denied, on the grounds that plaintiff's motion was not predicated on current information pertaining to student integration in the district; that the district has been in full compliance with the Court's order of August 31, 1970, since date of entry, which order carried plaintiff's approval; that plaintiff had consistently approved defendant's implementation of that order since its entry; that desegregative results, if any differing from those anticipated in 1970 were the result of changed residential patterns beyond defendant's control; that since 1970 defendant has taken no affirmative action with segregative intent, nor refrained from taking any action within the scope of the order which, if taken, would have increased desegregative results; and that the 1970 order promulgated the most educationally sound and constitutionally acceptable student integration plan presently available to defendant.

In the alternative, defendant's reply prayed that, in the event the Court found merit in plaintiff's motion for supplementary relief, defendant would be permitted to defer implementation of any new student integration plan until the beginning of academic school year 1977-78. Defendant's memorandum contained several reasons in support of its alternative plea.

Simultaneously with its reply, defendant filed request for oral hearing in order to adduce evidence by testimony in open court. By date of August 5, 1976, this Court entered order granting defendant's request for oral hearing and setting the same for August 16, 1976.

On August 11, 1976, motion to intervene as interested parties, together with complaint in intervention, was filed by counsel on behalf of certain named parents and students of defendant district, and of others similarly situated, which motion and complaint urged denial of plaintiff's motion on various grounds.

Hearing in open court was conducted on August 16, 1976. Counsel for the parties, including intervenors, argued their positions. The Court deferred ruling on plaintiff's motion until plaintiff had been given an opportunity to amend its motion.

On August 17, 1976, plaintiff filed its opposition to the motion to intervene, as well as its amended motion for supplementary relief, with memorandum attached. On that same day, intervenors filed a supplementary motion to intervene. Plaintiff's amended motion no longer sought relief to be effective with the beginning of the 1976-77 academic school year, but, rather, with the beginning of the Spring Term 1977.

On August 19, 1976, hearing on plaintiff's motion was reconvened. Additional arguments by counsel were heard, as was the testimony of several witnesses called by defendant. Neither plaintiff nor intervenors offered witnesses.

After a consideration of the foregoing, the Court finds that defendant district has not been provided notice of the details of any violation of equal educational opportunity or of equal protection of law, and further that plaintiff

has neither alleged nor proved specific instances or examples of denial of these rights to any person by defendant district. Without such notice defendant has not been permitted sufficient opportunity for community participation in the development of a remedial student integration plan as sought by plaintiff.

The Court further finds that defendant district has fully complied with this Court's order of August 31, 1970, from date of entry to the present.

The Department of Health, Education and Welfare, an agency of plaintiff charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and prospectively, for academic school year 1977-78.

While specific desegregative effects anticipated at the time of entry of the Court's order in August, 1970 may not have been fully realized, nonetheless, the overall, district-wide desegregative effects of that order have been greater than were anticipated. The desegregative results differing from those anticipated in 1970 have been the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of defendant, particularly in the Hebert High School and Odom Junior High School neighborhood attendance zones.

Since entry of this Court's order of August 31, 1970, defendant district has taken no affirmative action with segregative action within the scope of such order which, if taken, would have increased desegregative results. Student assignments to individual classes at South Park High School and in the other schools of defendant district have consistently been made without regard to race, color or

national origin, and the method of student class assignment employed by defendant has had a definite desegregative effect.

No state agency has attempted to alter the residential or demographic patterns affecting the neighborhood attendance plan set forth in that order since entry of the 1970 order.

In each academic year since entry of the 1970 order, student enrollment district-wide has consistently declined. Further, during that six-year interval the percentage of black students enrolled in defendant district has increased from about thirty-three percent to about forty percent.

Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief.

Further, the Court's order of August 31, 1970, desegregated the South Park Independent School District, thereby dissolving all vestiges of a dual school system. The resultant and now existing unitary system complies with the constitutional requirements enunciated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

No action, or inaction, by defendant district since entry of this Court's order on August 31, 1970, has had, as a natural and foreseeable consequence, a segregative effect on student integration. Therefore, no further action by this Court is required. *Pasadena City Board of Education* v. *Spangler,* ..... U.S. ..... (1976); *Stout* v. *Jefferson County*

Board of Education, ...F. 2d ....., (5th Cir. 1976, No. 75-2978).

Plaintiff has failed to establish that the integration order entered by this Court on August 31, 1970, is constitutionally flawed. Thus, the Court hereby reaffirms the constitutionality of that order and must direct defendant district to continue to comply with such order in all particulars.

It is accordingly ORDERED, ADJUDGED and DECREED that plaintiff's Motion for Supplementary Relief, as amended, be, and the same is hereby DENIED.

RENDERED this the 19th day of August, 1976.

/s/ Joe J. Fisher
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,

Defendant.

CIVIL ACTION No. 6819

ORDER PERMITTING CLASS ACTION INTERVENTION BY INTERVENORS

On this date came on for consideration the Motion to Intervene individually and in a class action filed on behalf of the parties and individuals listed on Intervenors' Original and Supplementary Exhibit A attached hereto, and the Court being of the opinion that said Motion should be granted;

It is THEREFORE ORDERED, ADJUDGED and DECREED that those parties and individuals listed on Intervenors' Motion and Supplementary Exhibit A of Intervenors to Intervene shall be permitted to intervene in this action individually and as a class for appellate purposes to the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States, and thereafter assert any claim for relief in any evidentiary hearing or trial which they or others of their class and judicially decreed status of South Park Independent School District similarly situated may have against the parties plaintiff and defendant herein, and for the general purposes of asserting claims for Final Judgments, Declaratory Judgments, final injunctive relief, with respect to the class as a whole.

The Court FINDS and DECREES that the class represented by Intervenors is so numerous that joinder of all members is impracticable; and that there are questions of law or fact common to the class; and that their claims and defenses and of others occupying similar statuses are typical of the claims of the class so represented by intervenors.

The parties have acted on grounds generally applicable to the class thereby rendering this action appropriate for consideration for appellate and subsequent final relief with respect to the class as a whole to prevent inconsistent or varying adjudications with respect to individual members and groups of the class which would erroneously and unconstitutionally establish incompatible judicial standards of conduct compliance for the Plaintiff.

The Court further FINDS and DECREES that the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair and final, efficient adjudication of this controversy.

The Court further decrees:

(a) That each member of the class listed on Intervenors' Original Motion and Supplementary Exhibit A of Intervenors to Intervene may be excluded from the class, if he or she so desires, by November 1st, 1976.

(b) The judgment, whether favorable or not, will include all members who do not request inclusion;

(c) Any member who does not request exclusion may enter an appearance through counsel;

(d) Those listed on Intervenors' Motion and Supplementary Exhibit A of Intervenors to Intervene are

certified as representatives of the class;

(e) The counsel for the class is designated to be Hon. Joe H. Tonahill and his co-counsel, Hon. Leon Pettis, with Hon. Joe H. Tonahill designated as lead counsel for the class.

DONE this 19th day of August, 1976.

/s/ JOE J. FISHER
Chief Judge Presiding

APPENDIX G

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.[6]

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
v.
SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL
NUMBER 76-3669

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF INTERVENORS (PARENTS AND STUDENTS)

I. Notice is hereby given that Intervenors (Parents and Students), part of the Appellees above named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on January 23, 1978 by this Court its denial of Rehearing en banc February 23, 1978.

This appeal is taken pursuant to 28 USC 1254(1).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record.

III. The following questions are presented by this appeal.

QUESTIONS PRESENTED

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN HOLDING:

(a) THAT THE DISTRICT COURT BY ITS AUGUST 31, 1970 UNITARY SCHOOL SYSTEM DESEGREGATION ORDER DID NOT ESTABLISH A CONSTITUTIONAL SYSTEM OF PUPIL ASSIGNMENT, BUT RETAINED JURISDICTION SO AS TO REQUIRE THE DISTRICT COURT TO PERIODICALLY ADOPT A DIFFERNT PLAN TO ACHIEVE RACIAL BALANCE IN THE SCHOOLS, AND THEREBY HELD DIRECTLY AND IRRECONCILABLY IN CONFLICT WITH DECISIONS OF THIS COURT INCLUDING, BUT NOT LIMITED TO:

(a) *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 429 (1976);

(b) *Swann* v. *Board of Education*, 402 U.S. 1, (1971);

(c) *Austin Independent School District* v. *United States*, 429 U.S. 990 (1977)?

LEON PETTIS
Goodhue Buiding
Beaumont, Texas 77701

JOE H. TONAHILL
P.O. Box 670
Jasper, Texas 75951

By JOE H. TONAHILL
Counsel of Record

PROOF OF SERVICE

I, Joe H. Tonahill, one of the attorneys for Intervenors (Parents and Students), part of the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of March, 1978, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows: Solicitor General, Department of Justice, Washington, D.C. 20530; Hon. Mark L. Gross, Hon.

William C. Graves and Hon. Drew S. Days III, Department of Justice, Washington, D.C. 20530; Hon. Tanner T. Hunt, Jr., 624 Petroleum Building, Beaumont, Texas 77701, and Co-Counsel, Hon. Leon Pettis, Goodhue Building, Beaumont, Texas 77701.

JOE H. TONAHILL
Joe H. Tonahill
P.O. Box 670
Jasper, Texas 75951
Counsel of Record

APPENDIX I

20 *U.S.C.* 1702 (a) (6):

§ 1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments.

(a) The Congress finds that:

• • •

(6) The guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

Pub. L. 93-380, Title II, § 203, Aug. 21, 1974, 88 Stat. 514.

20 *U.S.C.* 1704:

§ 1704. Balance not required.

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational oportunity, or equal protection of the laws.

Pub. L. 93-380, Title II, § 205, Aug. 21, 1974, 88 Stat. 515.

20 *U.S.C.* 1705:

§ 1705. Assignment on neighborhood basis not a denial of equal educational opportunity.

Subject to the other provisions of this subchapter, the

assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, clor, sex, or national origin or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

Pub. L. 93-380, Title II, § 206, Aug. 21, 1974, 88 Stat. 515.

20 *U.S.C.* 1707:

§ 1707. Population changes without effect, per se, on school population changes.

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

Pub. L. 93-380, Title II, § 208, Aug. 21, 1974, 88 Stat. 516.

20 *U.S.C.* 1714 (a), (b), (c):

§ 1714. Transportation of students — Limitation to school closest or next closest to place of students' residence.

(a) No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or

next closest to his place of residence which provides the appropriate grade level and type of education for such student.

Health risks; impingement on educational process.

(b) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

School population changes resulting from population changes.

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

Pub. L. 93-380, Title II, § 215, Aug. 21, 1974, 88 Stat. 517.

20 *U.S.C.* 1751:

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance.

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

Pub. L. 93-380, Title II, § 251, Aug. 21, 1974, 88 Stat. 519.

20 *U.S.C.* 1754:

Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States.

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any orders seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

Pub. L. 93-380, Title II, § 255, Aug. 21, 1974, 88 Stat. 520.

Nos. 77-1464 and 77-1467

In the Supreme Court of the United States

OCTOBER TERM, 1977

GERALDINE HUCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1464

GERALDINE HUCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 77-1467

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in remanding this case to the district court for further findings of fact on the question whether a 1970 court-ordered desegregation plan has produced a "unitary" school district that satisfies the standards set forth in *Swann* v. *Board of Education*, 402 U.S. 1.

1. In August 1970, in litigation instituted by the United States, the district court ordered into effect "a school integration plan designed to establish a unitary school

system in South Park Independent School District" (Pet. App. C-1).[1]

In July 1976, the United States returned to the district court and moved for supplementary relief. The government asked the court to adopt a new desegregation plan in light of statistics that indicated the goal of a unitary school system had not been achieved. Four schools that had been designated for black students under the dual system remained all black under the 1970 plan; seven schools that were all white under the dual system remained virtually all white. During the 1975-1976 school year, 75.1 percent of all black students in the district attended schools that were 92 percent or more black; 77.5 percent of all white students attended schools that were 86 percent or more white (Pet. App. A-6).[2]

The district court, without a full evidentiary hearing, found that the 1970 plan had desegregated petitioner school district, "thereby dissolving all vestiges of a dual school system" and producing a unitary system (Pet. App. B-6). The court also found that the school district had not violated the 1970 court order and had not taken any action that "had, as a natural and foreseeable consequence, a segregative effect on student integration" (*ibid.*). The court found in addition that the United States had not provided petitioner school district with notice of the details of the alleged denial of equal educational opportunity and equal protection of the laws and thus had deprived the district of a reasonable opportunity to develop a voluntary remedial plan, in conjunction with

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[1]Until the late 1950's, petitioner school district had operated a dual system pursuant to a Texas law that required black and white students and faculty to be assigned to separate schools (Pet. App. A-6 n. 2).

"Pet. App." refers to the appendices to the petition in No. 77-1467.

[2]In 1975-1976, the school district had approximately 12,000 students, approximately 40 percent of whom were black.

the local community (*ibid.*). Accordingly, the court held that, under 20 U.S.C. (Supp. V) 1758, it was precluded from granting the supplementary relief sought by the government.

The court of appeals reversed (Pet. App. A-1 to A-14; 566 F. 2d 1221). The court held that *Swann* v. *Board of Education, supra,* provides the standard of review by which the effectiveness of the 1970 desegregation plan must be judged and that, under *Swann,* desegregation plans that entail the continued existence of one-race or predominantly one-race schools must be carefully scrutinized (Pet. App. A-9 to A-11). The court ruled that the district court erred in failing to examine the results of the 1970 plan in detail and in declaring the school district unitary solely on the basis of a finding that the district had complied with the 1970 court order. The court further held that in the absence of a valid judicial declaration of a school district's unitary status, the notice requirement of 20 U.S.C. (Supp. V) 1758 does not control, and that, even if Section 1758 were applicable, the government's letter to the school district, dated three months before the government's motion for supplementary relief, provided sufficient prior explanation of the ways in which the district's existing system does not comply with federal law. The court remanded for supplemental findings to determine whether the district's assignment of students to schools is genuinely nondiscriminatory (Pet. App. A-11).

2. The non-final ruling of the court of appeals does not merit review by this Court. The decision of which petitioners now complain did not finally dispose of the motion filed by the United States; it merely remanded the case for further factual and legal determinations by the district court. In the absence of extraordinary circumstances, this Court has declined to review non-final orders issued by the courts of appeals (see, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v.

Bangor & Aroostook Railroad Co., 389 U.S. 327), and this salutary practice should be followed here.

3. In any event, the court of appeals' determination is correct. Petitioners err in arguing that the implementation of the 1970 plan immediately established a unitary system. No court has reviewed the actual results of that plan, and such review is necessary before any school district is declared unitary. *Green* v. *County School Board*, 391 U.S. 430, 439.

This Court held in *Swann* that "in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition" (402 U.S. at 26). The continued existence of all-black schools previously designated as black schools under a dual system requires close judicial scrutiny, and places the burden on district officials to establish that the racial composition of these schools is not a product of past or present discrimination by school authorities (*ibid.*). The court of appeals' ruling is consistent with other post-*Swann* decisions by that court in similar cases; this Court has repeatedly deemed further review unnecessary in such situations. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F. 2d 878, certiorari denied, 410 U.S. 966; *Hereford* v. *Huntsville Board of Education*, 504 F. 2d 857, certiorari denied *sub nom. Huntsville Board of Education* v. *United States*, 421 U.S. 913; *United States* v. *Texas Education Agency*, 512 F. 2d 896, certiorari denied *sub nom. Richardson Independent School District* v. *United States*, 423 U.S. 837; *United States* v. *Columbus Municipal Separate School District*, 558 F. 2d 228, certiorari denied, No. 77-626, January 9, 1978; *Lee* v. *Demopolis City School System*, 557 F. 2d 1053, certiorari denied, No. 77-649, January 9, 1978.

The determination that 20 U.S.C. (Supp. V) 1758 does not bar the district court from ordering further relief in response to the United States' motion is also correct. The court of appeals' summary of the letter the United States sent to the school board three months before filing its motion shows that the United States provided the requisite notice of the "details of the violation" and allowed "the local educational agency * * * a reasonable opportunity to develop a voluntary remedial plan" (Pet. App. A-7 n. 3, A-12). As the court of appeals noted, the motion for relief was not filed until after the school district responded to the United States' letter (Pet. App. A-12). That response stated that the school district would not consider further desegregation for at least one full school year.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

DOJ-1978-06

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